



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A66/2016

In the appeal of:

MALEFETSANE JOSEPH SANDAWANE

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J *et* MURRAY, AJ

HEARD ON: 13 JUNE 2016

JUDGMENT BY: MURRAY, AJ

DELIVERED ON: 30 JUNE 2016

[1] The Appellant was arraigned in the Regional Court at Welkom on a charge of Rape in contravention of s 3 read with s 1, 56(1), 57, 58, 59, 60 and 91 of the Criminal Law (Sexual Offences and Related

Matters) Amendment Act, Act 32 of 1997, as well as with s 51(1) and Schedule 2 Part 1 of Act 105 of 1997.

[2] On 12 November 2015 the Appellant was convicted as charged and sentenced to life imprisonment. He now appeals against both conviction and sentence in terms of s 309(1)(a) of the Criminal Procedure Act, Act 51 of 1977. The main issue on appeal is whether the Appellant did commit rape, and if so, whether it constituted multiple incidences of rape.

[3] S 51(1) of Act 105 of 1997 determines that a court *shall* impose a sentence of life imprisonment on a person who is convicted of an offence which falls under Schedule 2 Part 1 of Act 105 of 1997. Multiple rapes of the same victim indeed fall under Part 1 of Schedule 2 and unless substantial and compelling circumstances justify the imposition of a lesser sentence, life imprisonment is the ordained minimum sentence for the offence.

[4] The Appellant had legal representation for the duration of the trial and was duly warned of the implications of s 51(1). In the appeal he was represented by Ms Kruger, while Ms Lesie-Shale appeared for the State. The State supported his conviction and sentence.

[5] The salient facts on the complainant's version (which the trial court accepted as credible and reliable) are that on 19 January 2014 shortly after 3:00 in the morning at Nyakallong, Allanridge, the Appellant accosted the complainant, 34-year old Ms N. B., while she was on her way to the police station with the meat cleaver ("butcher's axe") with which she had cut her husband during a fight. While she walked, she was talking on her husband's cell-phone to his gay friend who had been the direct cause of the fight. Her unknown assailant (the Appellant) broke the cider bottle which he had with him and attempted to wrest the cleaver from her hand. There was sufficient light from an Apollo lamp and the surrounding shops for her to see his face. While they struggled, the cloth in which she was wrapped, dropped, leaving her in only her underwear. The Appellant grabbed the cleaver and told her he was going to rape her.

[6] He took her into a passage between a pre-con wall and some toilets, undressed himself, told her to lie on the ground on her back. She was naked, but was so terrified of what he was going to do with the meat cleaver that she could not recall whether he or

she herself had removed her underwear. Still holding the cleaver, the Appellant put on a condom, inserted his penis into her vagina

and started moving up and down on her "*for some time*". After a while he removed the condom, telling her that he was not enjoying it, and instructed her to kneel and open her mouth. He then forcibly inserted his penis into her mouth. Thereafter he instructed her to stimulate it by hand.

[7] She was seven months pregnant at the time and told him that she was in pain, but that did not deter him. He simply told her to get down on her knees, holding the wall, and again penetrated her vagina, but this time without the condom, and from behind. In that position, as she put it, "*he raped [her] for some time*".

[8] Once they had left the passage in front of the toilets and reached a certain pole, he again took out his penis and showed it to her, saying that, as she could see, he was not yet satisfied. He took her back to the toilets, told her to open her legs, then raped her for the fourth time. By that time it was getting light and taxis started to arrive at the nearby taxi rank. He then asked where she lived and,

since she was limping, supported her as they walked to her house, telling her to stop limping otherwise people would notice that something was wrong. At her house he informed her that he was going to keep having sex with her "*until the baby was out*". She told him that she was just going to fetch her children from the neighbours, but that he in the meantime should go to bed and relax.

[9] As soon as she reached her in-laws' house next door, she told them what had happened. She was crying and was still standing at their door when she saw Lucky and Mosile jump over the fence between the two houses in pursuit of the Appellant. An ambulance took her to the police station. She told the police that she would be able to identify the Appellant if she saw him again. When they showed her a photograph in an identity document, she recognised his face even though on that photo he was still a young man and still had his hair.

[10] In evaluating the evidence, the trial court correctly applied the guidelines set out in *S v Civa*¹, namely that:

"evidence must be weighed as a whole, taking account of the probabilities, the reliability and

¹ 1974(3) SA 844 (T)

opportunity for observation of the respective witnesses, the absence of interest or bias, the intrinsic merits or demerits of the testimony itself, any inconsistencies, corroboration, and all other relevant factors .."

[11] I agree with the trial court's finding that the complainant was honest and straightforward, and gave a logical, chronological and consistent description of the night's events. She never wavered from her version in cross-examination, she did not contradict herself and there were no inherent improbabilities in her story. Even though she was a single witness regarding the rapes, I could find no reason on the evidence to doubt her version. She was indeed honest enough to admit having cut her husband with the meat cleaver, which incident had led to their respective trips to the police station. As soon as she and the Appellant reached her house, she went to her in-laws' house and told Mosile and Lucky about the rapes. I agree with the trial court's finding, therefore, that *"there is no apparent reason why she would fabricate such an elaborate sequence of events"*.

[12] Corroboration for the material aspects of her evidence, furthermore, was found in the evidence of Mosile Ratselani who

confirmed that the Complainant, with the meat cleaver in her possession, had left her children with them and had returned at around 5h45, "*terrified and crying*", to tell her that she had been raped and that the person who had raped her was in her house. She testified that all of them, including the Complainant's husband, then went to the Complainant's house, and unsuccessfully ran after the Appellant when he fled over the wall. She confirmed that the Complainant had no cell-phone and stated that she herself clearly identified the Appellant from about three metres away.

[13] It is trite, as stated in *S v Francis*², that a court of appeal's powers to interfere with the findings of the trial court on credibility are limited and that:

"bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with the trial court's evaluation of oral testimony."

[14] I cannot fault the trial court's acceptance of the Complainant's evidence as not only credible, but also reliable. The Complainant testified that she could clearly see the Appellant's face in the light

² 1991 (2) SACR 198 (A) at 204c-e

of the Apollo lamp and the lights of the surrounding shops; she spent almost three hours in his close company; it was getting light when they walked to her home; she also saw him in the house and again when he jumped over the fence. Ms Ratselani, whom the trial court described as an impressive witness, confirmed that it was indeed the Appellant whom she had seen running from the Complainant's house in the early hours of that morning. Ms Ratselani's description of the Complainant's appearance early on the relevant morning as "*crying and terrified*" was also held by the trial court to be confirmation of the suspicion of non-consensual intercourse. I see no reason for this court to interfere in the trial court's acceptance of the oral evidence of the State witnesses.

[15] The Appellant himself pleaded not guilty, simply denied the charge against him, and refused to testify. He offered no plea explanation and his alleged version, which in my view was obviously made up as the Complainant's evidence proceeded, was put to the Complainant, namely that the Appellant knew the Complainant well; that they lived only 500 metres from each other; that they had met in front of Shoprite the previous year and had exchanged phone numbers; that the Complainant had informed him that her husband was cheating on her; that on the day in question she had phoned him and asked him to come and stay with her since she

and her husband had had a fight and he had left the house; and that he met the Complainant on the street while he was walking towards her house, and they went to her house together.

[16] At first it was put to her that the Appellant asked her to have sex with him, that she consented and that they had sex twice, but only in her house. After a consultation with the Appellant, the latter's legal representative put to the Complainant that the Appellant had '*offered*' to have sex with her in order to comfort her and that she had agreed. He also put to her that "*when they met on the street that evening*", she had told the Appellant that she had financial problems and asked him for an R800 loan. He then gave her R200 from the R3 000 in stokvel money that he had with him. The Complainant denied all of these allegations. The State's version, in the light of the Appellant's refusal to testify, remained uncontroverted.

[17] The trial court in considering the Appellant's refusal to testify, relied on the principles in *S v Brown*³ to find that, although his failure to testify could not be held against him, it could act to his detriment in that the State's accepted evidence remains uncontroverted. In my view the State's uncontroverted evidence was indeed strong

³ 1996 (2) SACR 49 (NC) at 61

enough to prove beyond a reasonable doubt the *facta probanda* to substantiate a conviction of rape.

[18] The remaining question is then whether the Appellant was correctly convicted of multiple rapes punishable with life imprisonment or if he should have been convicted of only one incidence of rape for which 15 years' imprisonment is the ordained minimum sentence for second offenders.

[19] It was submitted on behalf of the State that the trial court correctly regarded the first three acts of penetration to have stemmed from a single intent and therefore to have constituted only one prolonged act of rape, but that that could not apply to the fourth act which was perpetrated only after they had already walked away from the rape scene. It was not quite clear from the judgment, though, that that was indeed what the trial court found. And in the judgment on sentence the trial court referred to the Appellant having raped the Complainant 'four times'. What is important, though, is that the court did explicitly find the Appellant to have raped the Complainant more than once.

[20] Ms Leslie-Shale argued that the last penetration was a separate new act of rape, driven by a new intent, while Ms Kruger, with

reference to *S v Blaauw*⁴, averred that all the penetrations had to be regarded as a mere continuation of the original intent and the original act because there was no evidence as to the length of time that elapsed between the various acts, none as to the distance that they walked before returning for the last penetration, and none as to the presence or absence of ejaculation in each instance.

[21] In *S v M*⁵ Satchwell J, after having referred to *S v Kimberley*⁶ and *S v Mohamotsa*⁷ concluded, regarding the different categories of rape

in Schedule 2 Part 1 of Act 105 of 1997, that

"the wording of the descriptions and categorisations of the circumstances of these rapes is clear and without ambiguity or confusion. What is proscribed is rape by the same rapist of the same rape victim on more than one occasion. All that is required, is that the rapes are repeated. It matters little whether the rapes are separated by hours or days or weeks or months..."

[22] A prolonged act of rape without rest or interruption and involving three ejaculations was regarded as a single act of rape according to the court in *S v Mavundla*⁸. However, closely followed acts of

⁴ 1999 (2) SACR 295 (WLD) at 300a-g

⁵ 2007(2) SACR 60 (W)

⁶ 2005(2) SACR 663 (SCA) at (24] and (25] at 668 h-1 and 669j – 670c

⁷ 2002 (2) SACR 435 (SCA) at 444i

⁸ 2012(1) SACR 548 (GNP)

vaginal and anal penetration were found to constitute two separate acts of rape in *S v Willemse*⁹. And in *S v Blaauw*¹⁰, on which the Appellant relied, where the accused ordered his victim to lie on the ground and penetrated her again after having done so while they both stood against a tree, the court held that he was merely completing the rape which he had commenced while they were both standing against the tree, and found him to have committed only one act of rape.

[23] In *S v Tladi*¹¹ the Supreme Court of Appeal found that there had been insufficient evidence to establish two rapes since the two penetrations stemmed from one sexual encounter which on the complainant's own evidence did not suggest *'an interruption in the sexual intercourse to constitute two separate acts of sexual intercourse and, therefore, two separate acts of rape.'* This conclusion was based on the complainant's evidence that suggested that the sexual acts were so closely linked that they amounted *'to a single continuing course of conduct without any 'appreciable length of time between the acts of rape''*.

⁹ 2011(2) SACR 531 (ECG)

¹⁰ 1999 (2) SACR (W) at 300b

¹¹ 2013 (2) SACR 287 (SCA) at [13];

[24] *In casu*, on the Complainant's own version, the first three acts of penetration in the passage in front of the toilets were closely linked in time and place. One could therefore either, in accordance with *Mavundla* and *Blaauw*, regard them as a single prolonged act of rape 'without rest or interruption', as the trial court remarked, or, in accordance with *Willemse*, see them as separate acts since the two vaginal penetrations were followed by an oral penetration.

[25] But, although in the circumstances of this case there might be a reasonable doubt about the singularity or separateness of these initial acts of penetration, there is in my view no doubt that the final penetration constituted a separate new act of rape. I respectfully agree with Satchwell J¹² that all that is required is that the rapes are repeated, regardless of whether they are separated by hours, weeks, or months. In the present case the evidence is that the Complainant and the Appellant were walking away from the scene of the rape when at a certain point the Appellant took out his penis again, showed it to the Complainant, instructed her to return to the rape scene and penetrated her again. That, in my view, constituted a new intent and a separate, new act of rape.

¹² S v M, *supra*.

[26] It corresponds with the decision in *S v Maxabaniso*¹³ where Plasket J held that the rapes in that case did not constitute one continuous rape since the intercourse had been interrupted when the appellant left the complainant in the bedroom to go to the toilet and penetrated her again upon his return. In my view the Appellant's decision *in casu* to allow them to walk away from the rape scene clearly concluded his initial intent to rape and the rape itself. His subsequent decision to turn around and go back to the rape scene, therefore, in my view constituted the initiation of a newly formed intention to rape and the final penetration constituted the practical implementation of that new intent. In this instance it would be reasonable to infer, therefore, that there was not one continuous course of conduct, or, as in one of the rapes in *S v Blaauw*¹⁴ a mere interruption in the rape to change position, but two distinct acts of penetration.¹⁵

[27] I am of the view, therefore, that the trial court correctly convicted the Appellant of having committed more than one rape, which then placed his offence in Part 1 of Schedule 2, read with s 51(1) of Act 105 of 1997. And once it had been established that s 51(1) was

¹³ 2015(2) SACR 553 (ECP)

¹⁴ 1999 (2) SACR 295 (W)

¹⁵ *S v Maxabaniso*, *supra*, at [32]

applicable, the starting point of the Appellant's sentencing had to be life imprisonment.

[28] It is trite that a court of appeal can only interfere in a sentence if it is clear that the trial court misdirected itself in imposing the sentence that it did, or if it did not exercise its discretion properly or judicially. (See *S v Rabie*¹⁶, *S v Pieters*¹⁷ and *S v Pillay*¹⁸). The trial court in the present case imposed one sentence of life imprisonment although it found two rapes to have occurred. Plaskett J in *Maxabaniso*, held that that would not constitute a

¹⁶ 1975(4) SA 85S (A)

¹⁷ 1987 (3) SA 717 (A)

¹⁸ 1977 (4) SA 531 (A)

misdirection ¹⁹

. He confirmed that the correct way of charging an

¹⁹ S v Maxaba niso, *supra*, at [24] at 557h.

accused who was accused of raping a victim more than once, was to charge him with one count of rape, read with s 51(1), as was done in the present case, and to then impose one sentence of life imprisonment. In his view "the repeated penetration of the victim is what aggravates the perpetration of the rape and renders him liable for life imprisonment in respect of his entire course of conduct".

[29] The trial court found no substantial and compelling circumstances to justify the imposition of a lesser sentence than life

imprisonment. In reaching that conclusion, the court took into account the Appellant's personal circumstances, namely that he was 32 years old when the offence was committed; that he was a single parent with a 10-year old child who live with the biological mother; that he had completed Grade 12 at school; that he had earned R2400 per month with piece jobs which earnings he used to support his family, and that he had spent 23 months in custody pending the finalisation of the case.

[30] In considering the seriousness of the offence, on the other hand, the court stated that the Appellant had raped the Complainant four times in the space of two-and-a-half hours; had forced her to have oral intercourse; had disregarded the fact that she was seven months pregnant; had caused the total breakdown of her marriage; had caused her to fear men; that he had a previous conviction (in 2010) of the same offence of rape for which a sentence of 8 years' imprisonment had been imposed on him, with 2 years thereof suspended for 5 years; that he had therefore been out on parole when the present rapes were committed; that he does not appear to have learnt from his previous incarceration and that it had been an extremely serious instance of rape..

[31] The trial court carefully considered the aims of punishment, namely retribution, rehabilitation, deterrence and prevention and the Zinn-triad, and weighed up the mitigating against the aggravating circumstances of the case. Of the factors which the trial court did consider in mitigation, the Appellant's age could in terms of *S v Matyityi*²⁰ at most have been a neutral factor regarding its possible effect of diminishing moral blameworthiness, however, since there was no evidence that his 'relatively youthful' age had influenced or affected his conduct

[32] It is only when the proportionality of the Appellant's sentence of life imprisonment is considered that his age of 34 could have an effect. In *S v Martin*²¹, for instance, the court warned that discrepancies between the imposition of life imprisonment on young as opposed to old offenders cannot be ignored and held that:

"A life sentence imposed upon a lively man of 30 imposes a much longer and harsher sentence than the nominally identical sentence when imposed on a man of 65 who has lost interest in everything around him."

²⁰ 2011(1) SACR 40 (SCA)

²¹ 1996(2) SACR 378 (W) at 385E - G

[33] However, as subsequently stated in *S v M*²², despite the fact that a person who is 25 years old at the time of sentencing is more likely to serve a longer period of imprisonment than someone sentenced at the age of 60, that should not in and of itself cause a court to fail to impose a life sentence where it is statutorily required.

[34] Traditionally, time spent in custody while awaiting trial is taken into account for purposes of sentencing and such time is usually deducted from the potential sentence. A life sentence, however, is theoretically indeterminate. The 23 months which the Appellant was incarcerated pending finalisation of his trial could, according to the court in *S v M*²³, therefore not individually have served as a substantial and compelling circumstance. (See also *S v Tladi*²⁴, *supra*).

[35] None of the factors which the trial court considered in mitigation, could in my view, individually have constituted substantial and compelling circumstances. Neither could they cumulatively have rendered life imprisonment unjust when weighed against the aggravating factors in this case.

²² 2007 (2) SACR 60 (W) at [113]

²³ 2007(2) SACR 60 (W) at [111] and [114]

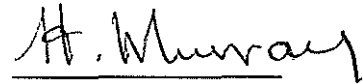
²⁴ 2016(1) SACR 424 (GP)

[36] Besides the factors which the trial court itself mentioned regarding the seriousness of the crime, furthermore, two factors in my view added to the heinousness of the offence, for instance that the Appellant had subdued his victim into compliance with the broken bottle and then with the meat cleaver, and that the Appellant had after the first rape removed the condom and so potentially exposed the Appellant and her unborn child to possible HIV infection.

[37] Since the aggravating factors by far outweighed the mitigating ones, in my view the trial court correctly found there to have been no substantial and compelling circumstances to justify the imposition of a lesser sentence than the ordained one of life imprisonment. The court neither misdirected itself, nor imposed a sentence that is so disturbingly inappropriate as to warrant interference by this court. The Appellant's sentence of life imprisonment therefore has to stand.

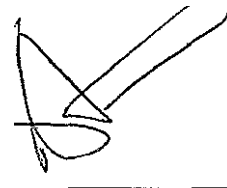
WHEREFORE THE FOLLOWING ORDER IS MADE:

1. The appeal is dismissed and the Appellant's conviction and sentence are confirmed.



H MURRAY AJ

I concur:



L J LEKALE J



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